

MODEL SALE OF TOBACCO PRODUCTS TO MINORS CONTROL ACT

**A Model Law Recommended for Adoption
by States or Localities
to Prevent the Sale of Tobacco Products to Minors**

**U.S. Department of Health and Human Services
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Introduction

The great majority of states prohibit sale of tobacco products to minors. Yet over one million teenagers start smoking each year, and minors buy about one billion packs of cigarettes each year. Because nicotine is an addicting drug, a minor who starts smoking is likely to be a lifelong customer--and one in four will die prematurely of lung cancer or other smoking-related disease. Illegal tobacco sales dwarf illegal alcohol and hard drug sales to minors, and the resulting mortality is many times greater--390,000 deaths a year. These are preventable deaths, and many of them occur because youth can obtain tobacco products with ease. Over eighty percent of teenagers correctly believe that it is very easy for them to buy cigarettes.

Access of minors to tobacco is a major problem in every state of the nation. About three-fourths of the million outlets which sell cigarettes to adults also sell cigarettes to minors. These stores ignore the laws of their states because enforcement is almost non-existent. Many retailers are even unaware that such sales are illegal. Yet there are straightforward enforcement approaches which can eliminate almost all sales to minors while yielding revenues to cover the cost of enforcement. Teenage smoking can be greatly reduced without disruption either to governments or to sales to adults.

Data on the nature and extent of the enforcement problem, and information on successful community efforts to prevent illegal sale of tobacco products to youth, are presented in the report of the Office of the Inspector General titled "Youth Access to Cigarettes," dated May, 1990. Additional information on this issue can be obtained from the Office on Smoking and Health, within the Centers for Disease Control of the Public Health Service.

The Department of Health and Human Services has reviewed options for improving enforcement. The approach we have developed is embodied in a draft model law. We recommend that each of the 50 states enact this model. No state now uses all of the tools needed to make enforcement effective. In states which are not immediately willing to adopt the model law, counties and cities can enact most features by ordinance and prevent children's access to tobacco products.

No enforcement scheme is perfect. Many of those who are already addicted will find ways to get tobacco to meet their craving for nicotine. But for most teenagers, easy access to tobacco products and addiction can be eliminated. For others, reductions in frequency and numbers of cigarettes smoked will decrease the likelihood of becoming long-term smokers.

Summary of the Model Law

The model law has several key features. These are summarized below and discussed further in the section-by-section analysis. Some of these features can and should be modified by each state to reflect its internal organization and processes. But the underlying approaches, however implemented, are key to effective enforcement. The model law would:

- o Create a licensing system, similar to that which is used to control the sale of alcoholic beverages, under which a store may sell tobacco to adults only if it avoids making sales to minors. Signs stating that sales to minors are illegal would

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be required at all points of sale.

- o Set forth a graduated schedule of penalties--monetary fines and license suspensions--for illegal sales so that owners and employees face punishment proportionate to their violation of the law. Penalties would be fixed and credible. Those who comply would pay only a license fee.

- o Provide separate penalties for failure to post a sign, and higher penalties for sales without a license.

- o Place primary responsibility for investigation and enforcement in a designated state agency, and exclusive authority for license suspension and revocation in that agency, but allow local law enforcement and public health officials to investigate compliance and present evidence to the state agency or file complaints in local courts.

- o Rely primarily on state-administered civil penalties to avoid the time delays and costs of the court system, but allow use of local courts to assess fines, similar to traffic enforcement. This would provide flexibility to both state and local authorities to target enforcement resources. (An illegal sale could not result in two fines, but a local conviction would be reported to the state and count towards possible license suspension).

- o Set the age of legal purchase at 19. This is higher than under many existing state tobacco statutes, but lower than the age for alcohol. States may wish to consider age 21, because addiction often begins at ages 19 and 20, but rarely thereafter.

- o Ban the use of vending machines to dispense cigarettes, parallel to alcohol practice and reflecting the difficulty of preventing illegal sales from these machines. (This is another area where states should examine options carefully; allowing sales in places not legally open to minors, or use of store-controlled electronic enabling devices, may be acceptable alternatives. States could also consider phasing of the ban to minimize disruption.)

- o Contain a number of features to minimize burdens on retail outlets: requiring identification only for those who are not clearly above the age of 19, allowing a driver's license as proof of age, setting a nominal penalty for the first violation, disregarding one accidental violation if effective controls are in place, having the state provide required signs, and setting license fees lower for outlets with small sales volume.

The model law does not explicitly address several topics, including possession of tobacco by minors, earmarking revenues for enforcement, allowing local ordinances to be stronger than the state law, and authorizing use of minors in "sting" operations to detect violations. This does not mean that states should not consider including such provisions, as discussed further below, but that we did not believe them necessary or appropriate within the statute. For example, use of stings will be vital to effective enforcement of this law, but like other investigative procedures need not be detailed in statute.

In summary, the model law attempts to create workable procedures which will provide retail outlets the incentive and tools to refuse to sell to minors, as already required by law in almost all states. Stores which comply will have no burden other than a licensing fee and, in some cases, replacement of vending machine by over-the-counter sales. Compliance by responsible stores, which would quickly become the great majority, will enable state and local authorities to concentrate enforcement efforts on a small number of recalcitrant outlets. The few stores which are unable or unwilling to prevent sales to minors may elect to stop carrying tobacco products, or will lose the license to sell tobacco products. Adults will continue to be able to buy cigarettes and other tobacco products at a wide range of outlets.

Ultimately, the effectiveness of this legislation depends on the willingness of concerned citizens to report violations to authorities who are responsible for taking investigatory and, if necessary, enforcement action. We are sure that enough citizens are concerned; the model law simply provides an effective and efficient system to handle their complaints, filling voids in almost all state enforcement schemes. Indeed, merely putting an effective enforcement mechanism in place is the single most important reform. The better the mechanism, the less likely it will have to be used.

Section-by-Section Analysis

Section 1 states the title of the bill; here suggested as "Sale of Tobacco Products to Minors Control Act."

Section 2 presents appropriate findings of fact. Most important, in this context, are that tobacco products are addicting, that addiction almost always starts in teenage years, and that smoking causes death on a large scale. States exploring these issues may wish to consult recent reports of the Surgeon General, which summarize and synthesize the large body of knowledge extant.

Section 3 establishes a state "Office of Tobacco Control" and the key powers of that office. Whether that office would best be located in the Department of Health or the state alcohol sales licensing agency, or established as an independent agency, is uniquely a matter for state-specific decision.

Two key provisions of section 3 require the Office to operate a licensing system and to prepare and distribute to licensed outlets signs concerning sales to minors. Requiring a license for sale of tobacco products conditions the privilege of sale on compliance with the law. Later in the bill heavy penalties are provided for any sales (or free distribution) to any persons without such a license. Failure of licensed outlets to prevent sale to minors leads to financial penalties and revocation of the license. The text is worded to allow licensing mobile vendors—it is not the purpose of the law to harm any small businesses.

The state agency is empowered to investigate and enforce the law. The investigative and enforcement techniques are not specified in detail, since these are generally routine and well-established administrative functions. However, the most powerful technique for both investigation and enforcement will in most circumstances involve testing compliance

by sending underage persons to stores which sell tobacco products--especially those have been reported for illegal sales. A request to purchase cigarettes is then made and the sale, if consummated, provides evidence of violation of the statute. Properly designed and supervised by state or local officials, such testing can readily and inexpensively establish whether an outlet violates the law, and provide the basis for a formal complaint and enforcement decision. States and communities now using this approach often hire teenagers to perform this function as temporary employees, to provide insurance protection to the teenagers and assure proper supervision. Depending on other law (e.g., whether possession by minors is illegal) and court rulings, some states may wish to authorize this approach explicitly. Tennessee does so now.

The model law provides that local officials may also investigate violations, and either assist the state agency by bringing evidence before it or bring cases directly in local courts. Local officials in some cities and counties will have the resources and expertise to contribute significantly to enforcement. Such contributions will not only speed enforcement directly, but allow the state agency to allocate its resources where they are most needed. In general, the assumption of the bill is that there will be substantial state and local cooperation, similar to the kinds of arrangements used for traffic violations. A varied local role in investigation and enforcement will also be useful in identifying techniques which are particularly effective within each state.

The license fee is suggested as \$300 for most stores but only \$50 for stores with a volume of tobacco sales below \$5,000 a year. This should provide enough revenue to make enforcement budget-neutral, while protecting small businesses from what might be perceived as an onerous cost in relation to sales. Of course, enforcement costs will not necessarily vary by size of outlet and a state could balance these considerations differently. Regardless, a state could use additional distinctions (e.g., by size, or whether licensed to sell alcoholic beverages) or set these fees higher or lower; depending on other licensing systems, its revenue goals, and whether it wishes the tobacco control system to be fully financed through license fees. We have not suggested earmarking revenues to accrue directly to the Tobacco Control agency rather than the general fund, but some states might wish to do this.

Section 4 requires license holders to display the license and sign (section 7 provides a monetary penalty for failure to display them). A visible sign provides continuing notice to all --sales clerks, underage customers, and older customers--as to the law's requirements and the store's declared willingness to comply. The sign also aids clerks in refusing to sell to underage customers.

Section 5 provides that both licensees and their employees may not sell or give tobacco products to individuals known to be under the legal age, or to individuals who are not clearly older or who do not have appropriate proof of age such as a driver's license. It also bans entirely sales of "broken packs" (cigarettes are sometimes sold one-by-one to minors), vending machine sales, and sales other than at licensed outlets.

Two of these provisions raise significant questions. First, why age 19, when alcohol purchase is illegal below age 21 and most states now ban tobacco sales at age 18 or below? To the significant extent that tobacco, like alcohol, has been an adult privilege to which many teenagers turn at the first legal opportunity, raising the age will postpone

such exposure until the adolescent has reached an age at which mature judgment has a better chance of overcoming the intense pressure to experiment with "adult" behaviors. This postponement may be even more important for tobacco than for alcohol, since nicotine is rapidly addicting. Even a month or so of regular smoking is likely to create a lifelong addiction for most persons. Also, a realistic appraisal must concede that most teenagers a year younger than the legal age can readily obtain tobacco products from friends who can legally purchase them. Thus, an age 18 limit exposes most 16 and 17 year old youth to an easily exercised temptation. Only if the age limit is at least 19 can the state be confident that most high school students will not have ready access to tobacco. Of course, a few teenagers will be able to obtain such products from family or older friends; the issue here is ready access for most teenagers. Finally, only if the age limit is at least 19 will smoke-free school policies be fully enforceable--no students will have legal access to tobacco products. States are encouraged to consider age 21; this will parallel alcohol practice and also protect older teenagers during years in which many are still vulnerable.

Second, why ban vending machine sales? The basic problem with these sales is that they do not require human intervention--the active participation of a clerk who sells the product only after observing or checking age. Vending machines are often used now by adolescents, and vending machines will nullify otherwise effective action preventing over-the-counter sales. Sales personnel at a register cannot effectively police even nearby machines while serving other customers. Individual states may wish to consider two variations: allowing vending machine sales in places which minors may not legally enter at all, or electronic disabling devices which require positive action by a clerk to activate. However, Utah found that disabling devices were ineffectual in practice. Finally, states could consider allowing a grace period for elimination of these machines to minimize disruption.

Section 6 prohibits unlicensed sale or distribution of tobacco products. It allows exceptions for distribution by relatives or friends on private property not open to the public (e.g., the home) and for wholesale distribution. Section 7 provides for a fine of up to \$1,000, and imprisonment of up to 30 days, for unlicensed sale or distribution.

Section 7 establishes two types of financial penalties for violations committed at licensed outlets--civil money penalties and fines. These financial penalties apply both to license holders and sales personnel. Sales personnel are subject to penalties both to emphasize their responsibility under the law and to protect employers against the carelessness of employees. Financial penalties rise progressively with repeated offenses, and are designed to avoid penalizing compliant stores for truly isolated lapses occurring over wide periods of time. A license holder may also avoid one penalty in any two year period by showing that an effective system to prevent violations is in place, i.e., that the sale was a true lapse. The suggested penalty for a first offense is \$100 and no suspension; the fourth violation brings a \$1,000 dollar fine and a 9 to 18 month suspension of the license. In effect, law abiding stores have nothing to fear; persistent offenders will lose the right to sell tobacco products to adults.

The Department of Health and Human Services has found that use of civil money penalties assessed through administrative law judges rather than the courts has greatly improved the effectiveness and efficiency of enforcing various statutes related to fraud

and abuse. The capacity of the Federal criminal justice system is so stretched that without the alternative of civil money penalties, many "minor" frauds or other crimes simply could not be prosecuted. States face similar constraints. Using civil money penalties is not an "either-or" choice--under existing Federal law, both civil and criminal remedies are available and the choice of which to use in particular cases greatly facilitates effective enforcement. The advantage of this added tool is not only case-specific but systemic: the mere existence of a credible and workable civil money penalty raises the potential cost of statutory violations, and thereby deters violations.

Although the model law emphasizes civil money penalties, fines are authorized as well to provide an enforcement role for both state and local authorities and to provide flexibility of approach. For any particular instance of noncompliance, only one financial penalty may be assessed. Any penalties assessed at the local level must be reported to the Tobacco Control agency so that this agency can accumulate records needed for license suspensions.

Thus, the model law allows the following kinds of flexibility:

- o The Tobacco Control agency may develop a backlog of cases requiring hearings. If so, it may bring cases before a local court seeking fines rather than civil money penalties.
- o A particular county may be a substantial distance away from agency offices and this may inconvenience retailers, witnesses, and enforcement personnel. The agency can reduce this inconvenience by using local courts.
- o Some counties may have both investigator staff (e.g., county health officer) and court capacity to conduct an aggressive enforcement program, beyond the capacity of the state agency. If so, these counties can investigate and seek fines in the local courts. This will simultaneously improve enforcement in these counties and free up state resources for others.

The model law does not address disposition of proceeds from either civil money penalties or fines. Absent specificity, we assume that in most states the former would accrue to the state treasury and the latter to county or city treasuries. This provides an additional benefit of allowing either approach to enforcement: cities and counties can invest in enforcement without financial loss. Of course, a state could elect to earmark revenues differently.

Section 8 provides for license suspension, revocation, and nonrenewal. Starting with the second offense, there are progressively steeper periods of suspension: seven days for the second offense, up to 9 to 18 months for the fourth violation. Section 8 also provides for suspension of licenses for all outlets of a chain if more than three outlets have violated the law more than three times in a two year period. This provision creates a strong incentive for retail chains to ensure compliance by all of their outlets.

Other Matters. The model law does not prohibit purchase or possession of tobacco products by minors. Some states and communities already prohibit these and others may wish to consider this. We left out such provisions because in our judgment they

would be far harder to enforce--and of less relevance to preventing widespread availability--than prohibitions on sales. Such provisions also raise such issues as use of minors as sales clerks; establishment of enforcement procedures; establishment of penalties (small fines, community service, or attending smoking cessation programs are commonly proposed); and possible need to exempt purchase by minors in supervised "sting" operations. Regardless, any underage person smoking in public would indicate a potential violation of the sales ban even absent a possession or purchase law. Authorities could investigate the source of these tobacco products whether or not purchase or possession were banned. States willing to invest in enforcement for both sales and possession should consider adding possession prohibitions.

Finally, while the model law provides for a significant local role in enforcement, it does not provide for independent local statutes. States might wish to empower municipalities to levy higher fines or otherwise exercise some independent authority. The worst possible outcome would be to enact a state statute which failed to establish an effective and workable enforcement system while preempting local governments from filling this void.

Conclusion

Existing state laws prohibiting sales of tobacco products to minors have largely been ineffectual. This enforcement failure is hypocritical and contributes to a scoff-law environment. Unlike some other law enforcement problems, this is neither inherent or insuperable. Eliminating virtually all sales to minors does not even present particularly difficult enforcement problems. It simply requires workable procedures which create swift and sure sanctions for violations, with minimal cost or inconvenience to retailers and adult customers. There is a large and articulate body of citizenry--including a large proportion of teenagers and retailers--who understand the gravity of tobacco consumption as a public health problem and who would welcome reasonable laws. Enactment and responsible implementation of this model law is the single most important reform to improve the health of its citizens that any state could undertake in the decade of the 1990s.

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